Office-Supreme Court, U.S.
FILED
MAY 25 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1037

HUDSON COUNTY NEWS COMPANY, INC.,
a domestic corporation,
Plaintiff-Appellant,

vs.

ARTHUR J. SILLS, as Attorney General of the State of New Jersey, BRENDAN T. BYRNE, as Prosecutor of Essex County, JAMES A. TUMULTY, JR., as Prosecutor of Hudson County, and the STATE OF NEW JERSEY,
Defendants-Respondents.

Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney Pro Se and on Behalf of Respondents, State of New Jersey, Brendan T. Byrne and James A. Tumulty,
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EVAN WILLIAM JAHOS,
Assistant Attorney General,
and
JOHN W. HAYDEN, JR.,
Deputy Attorney General,
Of Counsel and on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Defendants-Respondents.

Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

Pursuant to Rule 16(b) of this Court, the Attorney General of the State of New Jersey, as Attorney *Pro Se* and on behalf of the State of New Jersey, Brendan T. Byrne, County Prosecutor of Essex County, and James A. Tumulty, Jr., County Prosecutor of Hudson County, moves to

dismiss and/or affirm on the grounds that the question presented is so unsubstantial as not to warrant further argument.

Opinions Below

The opinion from which appellant appeals to this Court is that of the Supreme Court of New Jersey entered December 2, 1963, reported in 41 N. J. 220, 195 A. 2d 626 (1963). An unreported opinion of Judge RALPH L. FUSCO of the Superior Court of New Jersey is contained in Appendix B of Appellant's Jurisdictional Statement.

Statute Involved

The statute involved herein is Chapter 174 of New Jersey Pamphlet Laws of 1962:

"CHAPTER 174, LAWS OF 1962

CHAPTER 174

"A SUPPLEMENT to 'An Act concerning the sale and distribution of newspapers, magazines and other publications in certain cases, and supplementing subtitle 10 of Title 2A of the New Jersey Statutes,' approved June 7, 1955 (P.L. 1955, c. 48).

"BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

"1. (C. 2A:170-77.2a. Notice by retail dealer a bar to delivery.) No person, firm or corporation engaged in the business of distribution of books, magazines or publications of any kind to retail dealers, after notification in writing by a retail dealer not to send or deliver to such dealer any book, magazine or other publication, shall send or deliver to such dealer such book, magazine or other publication.

"2. (C. 2A:170-77.2b. Penalty for failure to comply with provisions of act). Any person, firm or corporation which fails to comply with the provisions of section 1 of this act, after oral or written notification of such failure to comply by a retail dealer, shall forthwith remove from the possession of such dealer the book, magazine or other publication which was improperly delivered without cost or charge to the dealer. Any person, firm or corporation failing or refusing to remove such publications by the end of the second business day following notification of improper delivery shall be a disorderly person and shall be subject to a fine of not less than $500.00 or imprisonment for 30 days or both.

"3. (Note: Act effective.) This act shall take effect 45 days after enactment.

"Approved December 3, 1962."

Questions Presented

1. Is there any substantial federal question as to whether Chapter 174 of New Jersey Pamphlet Laws of 1962 violates the Constitutional Guaranty of Freedom of the Press?

2. Is there any substantial federal question as to whether Chapter 174 of New Jersey Pamphlet Laws of 1962 violates the Constitutional Guaranty of Equal Protection of the Law?

3. Is there any substantial federal question as to whether Chapter 174 of New Jersey Pamphlet Laws of 1962 deprives wholesale book and magazine distributors in New Jersey of liberty and property without due process of law?

Statement of the Case

Appellant, Hudson County News Company, Inc., is a New Jersey Corporation engaged in the wholesale distribution and sale of newspapers, books and magazines in the northern New Jersey Counties of Essex and Hudson. Appellees are the State of New Jersey, the Attorney General of the State of New Jersey and the County Prosecutors of the two aforementioned Counties.

The Prosecutor's office of Hudson County sometime subsequent to the enactment of 1962, N. J. P. L., Ch. 174, sent a printed announcement to Hudson County News Company, Inc., inviting it to attend "a conference of the clergy, laity representatives, retail dealers and distributors relative to the new laws of the State of New Jersey concerning obscene publications and the sale and distribution of all magazines and publications."

Harold J. Ruvoldt, Acting Deputy Attorney General of New Jersey, Hudson County Division to Deter and Eliminate Obscene Literature, outlined the provisions of 1962 N. J. P. L., Ch. 174. Mr. Ruvoldt and Deputy Attorney General Frank A. Verga, Acting Prosecutor of Hudson County, announced the intention of the Prosecutor's Office to enforce the statute as it is the prosecutor's duty to enforce all laws.

On January 29th, 1963, a meeting was held at the Hudson County Prosecutor's Office, at the request of representatives of the appellant, at which time the Prosecutor's Office again expressed the intention of proceeding with the enforcement of the statute and forthwith prosecuting any alleged violations by plaintiff or others in Hudson County of the laws of the State of New Jersey.

On January 16, 1963, William S. Family, Chief of Police of the City of East Orange, Essex County, circulated a

letter to "all Newsdealers of East Orange" in which he requested their cooperation in connection with the prosecution of violations of the newly-enacted provisions of 1962 N. J. P. L., Ch. 174.

On February 9, 1963, the various appellees herein were served with a summons and complaint in which Hudson County News Company, Inc., as plaintiff, sought a declaratory judgment (pursuant to N.J.S. 2A:16-50 *et seq.*) that Chapter 174 of New Jersey Pamphlet Laws of 1962 was unconstitutional, illegal and invalid and also sought to restrain and enjoin the enforcement of that statute. All parties thereafter stipulated to all material facts and agreed to treat the matter as one for summary judgment under Revised Rule 4:38 of the New Jersey Rules of Court. Oral argument was had on February 25, 1963, before Honorable Ralph L. Fusco, Judge of the Superior Court of New Jersey, who held that the statute under attack was constitutional and valid, and the restraint sought was denied. An appeal was taken to the Appellate Division of the New Jersey Superior Court but before argument this was certified to the New Jersey Supreme Court. That Court affirmed the decision below and appellants now appeal from this determination.

ARGUMENT

There are no substantial federal questions involved. The New Jersey Supreme Court has correctly ruled that 1962 N. J. P. L. 174 does not infringe upon, or involve the violation of, any of the constitutional rights asserted by appellants.

Introduction

The statute in question is not "obscenity" legislation. In order to create constitutional issues for the purpose of seeking jurisdiction of this court, Appellants and *amicus curiae*, throughout their arguments have intimated or assumed that the sole purpose of the enactment of this statute was to suppress obscene literature. In this manner they seek to create alleged constitutional defects by virtue of the circumstances that non-obscene as well as obscene publications may be rejected by the retailer and because they as distributor may incur some financial burden in adjusting their business practices to the requirements of the Act. Thus, appellants argue, groups or private individuals may be enabled to precensor publications and restrain the free publication and distribution of even the most refined reading material by pressuring retailers not to handle, or to return, certain material arbitrarily selected as objectionable. They argue further the legislation places an arbitrary restriction on their business without due process of law and violates the constitutional guarantee of equal protection of the Laws.

In creating this smokescreen, appellants and *amicus curiae* have made various references to the original bill which was rejected by the Governor and revised in order to overcome the very defects which appellants now seek to attribute to the present legislation.

Early in its opinion, the New Jersey Supreme Court perceived that obscenity was not involved in the operation or effect of the legislation in question, and outlined the basic issue in this cause. It stated (A5):

> "In dealing with statutory enactments we seek their purpose and effect and in our search we freely avail ourselves of legislative history. See *N. J. Pharmaceutical Ass'n* v. *Furman*, 33 N. J. 121, 130 (1960); *Lloyd* v. *Vermeulen*, 22 N. J. 200, 206 (1956). Here the history clearly discloses the evils aimed at and the efforts to deal with them within constitutional limits. There is no doubt that the original bill was viewed by its sponsors as an additional weapon in the arsenal against obscenity. *But there is equally no doubt that the bill, as finally enacted, is not confined to and does not turn on any findings of obscenity.* It provides that when a distributor sends a particular publication of whatever nature to a retailer, despite earlier written direction to the contrary, the retailer may notify the distributor that he wants it picked up and, in such event, the distributor must do so promptly. *Absent any statute, elementary business moralities and decencies would require ready compliance by the distributor; the question before us is whether, in the circumstances at hand, the placing of the authority of the State behind those moralities and decencies violates any constitutional inhibitions.*" (Emphasis added.)

If the infringement of any constitutional rights are involved in the subject matter of the legislation in question, they are those of the retailers whom this statute was designed to protect. These retailers are not parties to the action and understandably have not participated in the attack on the statute. It is the retailers who, for many years, have been burdened with receiving unwanted publications from the distributors and who very well have constitutional

rights not to be forced to continuously accept them in the course of business. As stated by the New Jersey Supreme Court at A6:

> "* * * when unwanted publications are delivered to the retailer he is not only burdened with problems of handling and storage and fire hazards, but is also placed under financial burden since he is charged upon receipt of the publications and is not credited until their return. They might also have noted that continued receipt and possession by the retailer of the unwanted publications might place him in jeopardy of arrest by police authorities where the publications are deemed to have crossed the border into obscenity."

A thorough analysis of all of the points raised by appellants and of the complaint which they initially filed in the Superior Court of New Jersey as well as of the argument they asserted on cross motions for summary judgment, clearly shows that the fundamental objection which appellants have to this statute is that it may impose a financial burden on them if they are required by a retailer to take back publications which they delivered to him "accidentally", after he served them with notice he no longer wanted such publications, within two days as provided by the statute, instead of within one week, which appellants assert they would customarily do anyhow. Conceivably, if the statute simply provided that appellants take back the unwanted, "accidentally delivered" publications within one week instead of within two days, all of the constitutional arguments asserted by appellants would fail.

A. 1962 N. J. P. L. 174 does not restrain distribution of literature.

The words of the New Jersey Supreme Court clearly answer the argument set forth by appellants in Point A of their jurisdictional statement (A12):

"Chapter 174 contains no elements of precensorship. The distributor may, as heretofore, freely distribute his publications. He incurs no penalty for distributing a publication even after having received a written direction to the contrary. It is only when he is specifically called upon by the retailer to pick up the unwanted publication without charge that he comes under an obligation of promptness which, if willfully disregarded, may subject him to a penalty. It is difficult to see how this elemental and thoroughly decent obligation can in itself be viewed as an unconstitutional restriction on freedom of the press. The retailer admittedly has the unfettered freedom to reject any unordered publication. He may consider it obscene, objectionable though not obscene, or just not saleable. His right of rejection is absolute and the State's implementation of that right, in the carefully limited manner set forth in Chapter 174, may readily serve the stated legislative goals without infringing on any constitutional freedoms."

B. 1962 N. J. P. L. 174 does not restrict freedom of the press.

This case does not involve a violation, anticipated, or otherwise, of the constitutional guarantee of freedom of the press. It involves neither restrictions of distribution nor restrictions in publication.

As commented upon heretofore in sub-heading A, the appellant distributors may distribute whatever they please to whomever they please, so long as the person receiving the material desires it. In fact the statute imposes no penalty upon delivery even after a retailer has requested that this be discontinued. It is only upon the failure of the distributor, after subsequent notice from the retailer, to take back those materials which he had previously been requested in writing not to deliver, that a disorderly persons offense is committed. Appellant asserts that this is its

practice in the first place, and it appears to do otherwise by force or compulsion would infringe on the constitutional rights of retailers by requiring them to buy publications they did not desire.

Nor is freedom of publication in anyway restricted. Merely because the press has a constitutional right to print and publish what it pleases, it does not follow that they can force the public to buy and read their material. Appellants assume and describe issues that do not exist and refer to cases generally involving freedom of speech, in an attempt to lay the foundation for jurisdiction of this Court. Nevertheless, their basic involvement in the legislation in question is that it may be more expensive for them to conduct their business if they have to avoid making or correcting mistakes that should not occur initially.

Article I, Paragraph 6, of the *New Jersey Constitution* prohibits, *inter alia*, "passage of law to restrain or abridge the liberty of * * * the press." The statutes in issue are not violative of the New Jersey Constitution nor the United States Constitution privileges which are implemented in the Fourteenth Amendment as the express legislative purpose is to prevent delivery of "unwanted" materials to a retailer and not to curtail publication thereof. The onus, if any, our Legislature has seen fit to impose, is cast upon the retailers to notify distributors of those magazines and publications which *they* (retailers) desire to return.

The rights of free *speech* and *press*, of *assembly* and of *worship*, are fundamental, but they are not absolute. *State* v. *Corbisiero*, 67 N. J. Super. 170, 176 (Hudson Cty. Ct. 1961). * * * and *the right of free press and of free speech* * * * is subject to certain police power. *Evans* v. *LePore*, 26 N. J. Misc. 215, 217 (Sup. Ct. 1948). Here the newly enacted statute protects the retail businessman and the distributor. Apropos of the "clear and present danger" doc-

trine as related to the particular circumstances, Chief Justice Vinson said: "When the effect of a statute or ordinance upon the exercise of First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity." *American Communication Ass'n* v. *Douds*, 339 U. S. 382, 70 S. Ct. 674, 683, 94 L. Ed. 925 (1950).

Clearly, N.J.S. 2A:170-77.2 (a) and N.J.S.A. 2A:170-77.2 (b) do not invade our cherished freedoms; but assure, under the authority of the state to impose valid police power regulations, the businessman of economic convenience in the operation of his business.

The free press is a bulwark of our democratic way of life and courts must be ever vigilant to curb insidious as well as candid attempts to restrict its vital public functions. However, where there is no such malevolent attempt and the governmental requirement is being fairly applied to all, including newspaper publishers, [or retailers and distributors as in the case at bar], courts find no impairment of the constitutional guaranty of freedom of press. *Absecon* v. *Vettese*, 13 N. J. 581, 586 (1953). See *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184, 66 S. Ct. 511, 514, 90 L. Ed. 607, 613 (1946); where the court noted that since "the press has business aspects it has no special immunity from laws applicable to business in general." See also *Associated Press* v. *National Lab. Rel. Bd.*, 301 U. S. 103, 132, 57 S. Ct. 650, 81 L. Ed. 953, 961 (1937); *Arizona Pub. C.* v. *O'Neil*, 22 F. Supp. 117 (D. C. D. Ariz. 1938), aff'd. 304 U. S. 543, 58 S. Ct. 950, 82 L. Ed. 1518 (1938); *Giragi* v. *Moore*, 48 Ariz. 33, 58 P. 2d 1249, 64 P. 2d 819, 110 A. L. R. 314 (1936), *appeal dismissed*, 301 U. S. 670, 57 S. Ct. 946, 81 L. Ed. 1334 (1937); *City of Corona* v. *Corona Daily Independent*, 115, Cal. App. 2d 382, 252 P. 2d 56 (1953), *certiorari* denied 74 S. Ct. 2 (1953).

The authority of the state to impose regulations in order to assure the businessman of economic convenience and security has never been regarded as inconsistent with basic liberties and freedoms but rather as one of the means of safeguarding the good order upon which sound business ultimately depends. See *Lane Distributors* v. *Tilton*, 7 N. J. 349 at pp. 366-369 (1951). This new statute is truly a valid exercise of police power for the health, safety and welfare of New Jersey businessmen and the New Jersey citizenry. *New Jersey Constitution*, Article IV, Section 1, par. 1; *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504, 179 A. 116 at 124 (E. & A. 1935).

Freedom of the press, as guaranteed by the First Amendment of the United States Constitution against abridgement by the federal government, is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by State action. *Joseph Burstyn, Inc.* v. *V. Wilson*, 343 U. S. 495, 72 S. Ct. 77, 96 L. Ed. 1098 (1952). In its historic connotation, the press comprehends every sort of publication, and the guarantee of a free press covers distribution as well as publication. *Lovell* v. *Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938). As Honorable RALPH L. FUSCO indicated in his oral opinion on March 14, 1963 (see B8a):

> "The issue is then whether there is an unlawful restraint on the distribution in question. It is difficult to determine wherein the prohibition lies. The plaintiff is not precluded from selling any or all magazines, newspapers, periodicals or other publications. It is not precluded from publishing or distributing, to those who want them any or all magazines, newspapers periodicals or other publications. A refusal to accept certain publications by retail dealers could not be considered as restricting plaintiff's freedom of the press;

therefore, it is doubtful if a statutory enactment which seeks to protect dealers in this respect can be a denial of the asserted constitutional right. There is no prohibition against publication or distribution to any retail dealers of any publications which it desires. The statute merely provides that retail dealers need not receive nor store unwanted publications.

C. 1962 N. J. P. L. 174 does not violate the constitutional guarantee of equal protection of the laws.

Appellants are in the business of distributing newspapers as well as books and magazines (Statement of Facts, Page 5). In effect therefore they argue that their constitutional guarantee of equal protection of the laws has been violated because the Legislature sought to regulate only some of the products they distribute, and they complain because it did not regulate them all. However, there is absolutely no indication that they are adversely affected in any manner because they are not more fully controlled.

The New Jersey Supreme Court assumed for the purposes of ruling on this issue that Chapter 174 was intended to exempt newspapers, and found that nonetheless such an exemption in nowise impairs the constitutional validity of the enactment (A13). See *Williamson* v. *Lee Optical of Okla.*, 348 U. S. 483 at 488-489, 99 L. Ed. 563 at 572-573 (1955); *N. J. Restaurant Ass'n* v. *Holderman*, 24 N. J. 295, 300, 301 (1957). The Court quoted at length from the opinion of Justice DOUGLAS in *Williamson* v. *Lee Optical of Okla., supra*:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U. S. 141,

84 L. ed. 1124, 60 S. Ct. 879, 130 A. L. R. 1321. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Oregon State Dental Examiners*, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570. The legislature may select one phase and hold and apply a remedy there, neglecting the other. *A. F. of L.* v. *American Sash & Door Co.*, 335 U. S. 538, 93 L. ed. 222, 69 S. Ct. 528, 260 6 A. L. R. 2d 481. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch," 348 U. S. at 489, 99 L. ed. at 573." (A14).

Appellants seek to cloak this issue by assuming the effect of the legislation is on obscene material only and argue that it exempts *obscene* newspapers but includes other *obscene* publications. Based on this, they conclude their constitutional rights are effected because there is no difference in the two that is reasonably related to the purposes of the act. As noted before the statute is not confined to and does not turn on any finding of obscenity. In practice, forced acceptance by retailers of materials distributed by appellant may not have included newspapers, which therefore did not require legislative attention. The measure of equal protection is the individual affected by the statute and under this law all distributors are treated equally. As noted by the New Jersey Supreme Court (A14a):

"Here the evils aimed at were primarily in the field of books and magazines. The Legislature had the clear right to confine itself to that field so long as it treated similarly circumstanced distributors in sim-

ilar fashion. There was no disparate treatment among the distributors. Within the well-accepted principles expressed in *Williamson*, there was patently no denial of equal protection. See *Two Guys From Harrison, Inc.* v. *Furman, supra*, 22 N. J. at 228-229, *Gundaker Central Motors* v. *Gassert*, 23 N. J. 71, 80-82 (1956); *Jamoneau* v. *Harner*, 16 N. J. 500, 519-521 (1954), cert. denied, 349 U. S. 904, 99 L. Ed. 1241 (1955)."

D. 1962 N. J. P. L. 174 does not create precensorship powers in the hands of private groups or individuals.

The argument set forth by appellant in Section D of its brief is grounded on an assumption that circumstances will now occur which would otherwise never develop, in which retailers reject materials they might desire to purchase, because of pressures which may be exerted by outside groups. There is no basis in any proof that this fear is a reality. Furthermore, the legislation in question does not create what appellants describe as the power of precensorship in private individuals or groups, for the same result may occur without the statute. Appellants claim that in practice, retailers rejected unwanted publications and they picked them up on a weekly basis instead of on two days notice before this legislation was passed. The pressures and resultant precensorship described by appellant could as well occur without this legislation, for the duties and sanctions imposed by the statute are directed to appellants, and offer no threat to retailers. If appellants are correct in stating that they cease to deliver certain materials at the request of retailers, and pick up within a week any materials they inadvertently do deliver, without the operation of the statute, it is difficult to see how the statute even affects them, except, perhaps, to require them to adopt more efficient business practices.

As noted by our New J rsey Supreme Court, this argument presents no substantial federal question (A13):

> "The plaintiff has suggested that future practices and pressures by public officials and private groups may be such that the retailer will not exercise any judgment of his own but will bow to their advance specifications, thus presenting a form of precensorship comparable to *Bantam Books* v. *Sullivan, supra.* That is not the situation before us and we therefore need not deal with it. The Supreme Court did not strike the statute in Bantam Books and our only concern at this time is with the validity of the statute and not with practices and pressures which may never materialize. See *Isolantit Inc.* v. *United Electrical, &c., of America*, 132 N. J. Eq. 613, 619 (E. & A. 1942); *State* v. *Bryce*, 56 N. J. Super. 83, 90 (App. Div. (1959)."

E. 1962 New Jersey Pamphlet Law 174 does not impose an arbitrary and oppressive restriction on a lawful business nor deprive appellant of liberty and property without due process of law.

As noted before, Appellant insists it is their policy to refrain from delivering any materials "if so requested by any dealer" and its practice is "to make a pickup once every week of all returns from retail dealers" (A4). Its sole practical objection to the legislation in question is that "if it were required to arrange for the pickup of particular unwanted publications as required by Chapter 174, it would be subjected to additional expenditures and its present method of distribution would be rendered 'economically unfeasible'" (A5).

New Jersey Pamphlet Law 174, 1962 does not outlaw, bar or prohibit the business conduct of the appellant. It

seeks to regulate certain business activity and is within the range of the State's discretion to promote business security in order to secure the general comfort, health and prosperity of the State. The State has a declared public policy to impose business regulations upon business conditions for the common good and welfare by means that are reasonable and appropriate to that end (See *Reingold* v. *Harper*, 6 N. J. 182 (1951). With this plain policy of protection of the basic interests of society in mind, the Legislature has sought to regulate the sale of magazines, periodicals and other publications in this State.

Our Federal and State Constitutions do not guarantee the unrestricted privilege to engage in business or conduct as one pleases. *Nebbia* v. *People of State of New York*, 291, U. S. 502, 78 L. Ed. 940 (1934); *Lane Distribution* v. *Tilton*, 7 N. J. 349 (1951). As noted earlier the practices which would be affected by this legislation are detrimental to the public welfare. When retailers receive unwanted publications they are burdened with problems of handling and storage as well as potential fire hazards. They are also placed under a financial burden since they are charged upon receipt of the publications and not credited until their return. In addition there is an obscenity regulation aspect to the legislation for continued receipt and possession by the retailer of unwanted publications could place him in jeopardy of arrest by police authorities, where the publications are deemed to have crossed the border into obscenity.

The statute was thoroughly analyzed in this respect by the New Jersey Supreme Court (A9-A10):

> "Paragraph 1 of Chapter 174 simply provides without penalty, that the distributor shall not send any particular publication to the retailer where he has received written direction from the retailer to the con-

trary. That such should be the policy of distribution may hardly be gain-said; the plaintiff's own complaint states that its policy has always been to refrain from delivering any particular publication, if so requested by the retailer. Paragraph 2 provides that if the distributor has sent a publication to the retailer despite written directions to the contrary, the retailer may notify him of that fact, in which event the distributor shall forthwith pick up the publication without charge. Here, again, it may not be disputed that such should be the policy and the plaintiff's own complaint asserts that its practice is to pick up returns although not as promptly as called for by the statute.

"The requirement of promptness is a fair one and the fact that its imposition may compel the plaintiff to alter its private business practices cannot serve to impair the constitutional validity of the statute. The plaintiff contends that the requirement of removal within two days is oppressive in that it would apply even where it 'inadvertently or by some act completely beyond its control' fails to effect its pickup. At oral argument the State disavowed any legislative intent to punish for inadvertence and agreed that the statute should be construed to apply only to willful failures to remove within the allotted time. This construction which we now adopt, is consistent with recent pronouncements which have justly sought to avoid the imposition of punishment for innocent default. See *State* v. *Hudson County News Co., supra*, 35 N. J. at 293; *cf. State* v. *Schlueter*, 127 N. J. L. 496, 499 (Sup. Ct. 1941)."

CONCLUSION

Appellant has raised no substantial Federal question which warrants the further attention of this Court and therefore it is respectfully urged that the instant appeal be dismissed, or in the alternative that the judgment of the New Jersey Supreme Court be affirmed.

Respectfully submitted,

ARTHUR J. SILLS,
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